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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

AMERICAN AIRLINES, INC., *Petitioner,*

v.

NORTH AMERICAN AIRLINES, INC., *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF OF PETITIONER

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AMERICAN AIRLINES, INC., *Petitioner,*

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REPLY BRIEF OF PETITIONER

I.

THE RESPONDENT'S OPPOSITION ON THE FIRST QUESTION PRESENTED.

The respondent admits that it never raised objection to the scope of the remedy ordered by the Board. (Br. in Opp. p. 2) Hence this Court need not examine the documents recording the several steps in the Board's proceedings and in the proceedings in the lower court to which the Petition refers in some detail

and which show respondent's repeated failure to object on the numerous occasions when it had the opportunity to do so.

The respondent seeks to explain away the patent conflict between the lower court's decision and this Court's decision in *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 340 U. S. 492 (1955). (Br. in Opp. pp. 6-7) It points out that the *Colorado* case arose under the Natural Gas Act, that that Act requires that a party seeking judicial review shall have stated his objections in a petition for rehearing to the administrative agency, and that the Civil Aeronautics Act does not require the filing of a petition for rehearing. And then respondent says that there is no question but that the Board's order in the present case "was a final order." The respondent concludes that the *Colorado* case "is just not applicable." (Br. in Opp. p. 7)

But the *Colorado* case was not decided on the ground that the order in question was not a final order. In that case there had been a petition for rehearing and the order was final. The point of the case was that the petition for rehearing had not set forth the objection which was considered by the reviewing Court of Appeals.

In the present case, under the Civil Aeronautics Act the reviewing court could consider any objection presented to the administrative agency at any appropriate time under the agency's procedure—not just in a petition for rehearing. But, despite the abundant opportunity to raise and so to preserve objection, the respondent failed to avail itself of the privilege. Hence the objection here could no more be considered by the reviewing court than could the objection in the *Colorado*

case. Indeed, in view of the broader opportunity to raise and preserve objections for judicial review which the Civil Aeronautics Act confers, there is *much less* excuse, under that Act, for permitting a reviewing court to consider new objections than there might have been under the statute involved in the *Colorado* case.

Next the respondent argues that the question of the scope of the Board's order was in fact considered by the Board, and therefore is open to judicial review. (Br. in Opp. pp. 7-9) It is true, of course, that the scope of the order was considered by the Board, and that the dissenting Board member objected that the use of the name "North American" should not be proscribed but its continued use should be permitted with the requirement that the respondent "make more clear in its advertisements and contact with the public that it is not to be confused with American Airlines." (Pet., p. 21a)

But this point in the dissent is *not* the objection raised and considered by the lower court. The lower court raises a wholly *new* objection to a wholly *different* aspect of the scope of the order involving an altogether *separate* set of considerations of fact, policy, and law. (Pet. pp. 18-19) The objection to the scope of the order raised *sua sponte* by the lower court was never—in the words of the applicable statute—"urged before the Board" and the reviewing court is expressly prohibited from considering it. Quite aside from the fact that the objection made by the dissenting Board member was never urged by the respondent, it would vitiate the doctrine of the *Colorado* and similar cases to permit a reviewing court to consider any conceivable new objection whenever one objection had been urged to the agency. Indeed, *Colorado* was just such a case and

this Court refused to allow the reviewing court to range so widely.

Finally the respondent relies on certain cases which, it argues, make it clear that the lower court had power to modify the Board's order. (Br. in Opp. p. 8). The cases are wide of the mark:

Hormel v. *Helvering,* 312 U. S. 552 (1941), decided that under a statute granting the reviewing court the power to reverse a decision of the Board of Tax Appeals "as justice may require" it is proper for the court to hold a taxpayer taxable under a section of the law not relied upon by the Commissioner before the Board of Tax Appeals in view of the fact that the applicability of that section had been determined by the Supreme Court in another case *after* the case in question had been decided by the Board of Tax Appeals. The case involved no statute limiting judicial review such as is involved in the present case; moreover the opinion recognized that the usual rule is that the reviewing court must not go beyond the case made before the subordinate tribunal and that the circumstances there were unusual.

Mulligan v. *Andrews,* 93 U. S. App. D. C. 375, 211 F.2d 28 (1954), involved only the familiar rule that an appellate court, to avoid miscarriage of justice, will entertain an objection not raised before a trial court — a rule not infrequently applied in cases involving, as did the *Mulligan* case, personal rights and liberties and dealing only with the relations of appellate to lower courts and not with the relations of courts to administrative agencies.

Phillips v. *Securities and Exchange Commission,* 156 F.2d 606 (2d Cir. 1946), by dictum, rather doubt-

fully approved a stockholder's raising in a reviewing court an objection to a simplification order affecting the stockholder's corporation under the Holding Company Act which in fact had been fully considered by the administrative agency; the stockholder had not appeared in the agency proceeding but his own corporation, of course, had appeared and fully litigated the same issue there.

And in *W. R. Grace & Co.* v. *Civil Aeronautics Board,* 154 F.2d 271, 286 (2d Cir. 1946), the only question was whether the petitioner for judicial review had raised before the agency the objection considered by the reviewing court—and the court held that it had been so raised. Indeed, the court was at some pains to make it clear that it was not acting *sua sponte.*

II.

THE RESPONDENT'S OPPOSITION ON THE SECOND QUESTION PRESENTED.

The respondent argues that the lower court's decision applies an alleged rule of this Court in *Jacob Siegel Co.* v. *Federal Trade Commission,* 327 U. S. 608 (1946), to the effect that an "established trademark or trade name" should not be excised if a less drastic remedy would suffice. (Br. in Opp. 9-10).

We need note only three points.

First, the present case involves no "established trademark or trade name" of the respondent. The case now involves only the respondent's new name Trans American (or other variations of the word American). But this is not the name in which good will had been "established" by the respondent—*i.e.,*

North American. So the basic premise of the *Siegel* case is lacking here.

Second, the *Siegel* case held only that the administrative agency should *consider* whether the less drastic remedy of using qualifying words instead of excising the established name would protect the public. From the respondent's own brief it will be seen that that very question was considered by the Board in the present case and was one of the points on which the dissenter divided from his brethren. In these circumstances the lesson of the *Siegel* case here pertinent is that

> "The Commission is the expert body to determine what remedy is necessary to eliminate the unfair or deceptive trade practices which have been disclosed. It has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist." 327 U. S. at 612-613.

Third, the lower court did not apply the principle of the *Siegel* case at all. Its objection was not that the Board had not considered alternatives but that the Board was absolutely precluded from adopting the particular remedy it chose absent evidence sustaining a finding of secondary meaning in the private law sense. As the Petition shows, this holding is not only unprecedented but squarely contrary to a long line of precedents. (Pet. pp. 20 ff.)

* * *

The respondent observes that the Government has not petitioned. (Br. in Opp. p. 6) But neither did it when this case was here before. It will be recalled that,

unlike Section 5 of the Federal Trade Commission Act, Section 411 of the Civil Aeronautics Act recognizes the interest of a private party as a complainant. The petitioner was a very active complainant and participant throughout these proceedings. As the courts have noted more than once, one of the important developments in administrative law is that the public interest often is vindicated upon the initiative of private parties. It is *argumentum ad hominem* to rely upon the identity of the petitioner.

Respectfully submitted,

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